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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 324

EMIL ORTMAN, as Special Administrator of the Estate of Donna Jean Ortman, Deceased,

Petitioner,

vs.

CLIFFORD S. SMITH AND JUDITH SMITH, by CLIFFORD S. SMITH, her Guardian ad Litem,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

M. T. WOODS and
F. M. SMITH,
Sioux Falls, South Dakota,
Attorneys for Respondents.

COMMERCIAL PRINTING COMPANY — SIOUX FALLS, SOUTH DAKOTA

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PRELIMINARY STATEMENT

Consolidated and restated it appears that petitioner's arguments for review by this Court are:

1. The decision of the Eighth Circuit Court of Appeals is in conflict with a decision of the Sixth Circuit Court of Appeals on the same matter.

2. There was error in the construction of the South Dakota Guest Statute.

3. The South Dakota Guest Statute, as construed by the Trial and Appeal Courts, is unconstitutional.

These arguments will be considered in the order stated.

ALLEGED CONFLICT IN DECISIONS

In this argument Petitioner seeks the benefit of one of the reasons for review suggested by this Court in its Rule 38. It is not applicable inasmuch as the case at bar involves the construction of a state statute demanding application of local law. *Erie R. Co. vs. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. To the extent that the State Courts have differed in their interpretations of guest statutes we may expect conflict in the decisions of the Circuit Courts of Appeal when called upon to construe them. Certainly the suggested reason for review adopted by Petitioner was not intended by this Court to overrule the doctrine established in the *Erie* case.

Moreover, the conflict urged by Petitioner does not exist. He cites the case of *Coop., et al. vs. Williamson, et al.*, 6th CCA, 173 F. (2d) 313. That decision applied the general rule of liability for negligent entrustment where the duty owed was that of ordinary care. The case did not involve a guest statute and could not, under any circumstances, serve as a precedent for the Eighth Circuit Court of Appeals in the case at bar.

ALLEGED ERROR IN CONSTRUCTION OF SOUTH DAKOTA GUEST STATUTE

In holding that the South Dakota Guest Statute applied to the absent owner of the vehicle involved, the Circuit Court of Appeals was governed by the express wording of the statute (set forth in Petitioner's brief) and the construction adopted by an overwhelming weight of authority. *Benton vs. Sloss*, ...Calif....., 234 P. (2d) 749, *Posey vs. Krogh*, 65 N. D. 490, 259 N. W. 757; *Cunningham vs. Bell*, 149 Ohio Statutes 103, 77 N. E. (2d) 918; *Randall vs. Stager*, 355 Pa. 352, 49 A. (2d) 689; *Hawkins vs. Sydnor*, 170 Va. 267, 196 S. E. 619.

We have found only two decisions in conflict with this construction. *Williams vs. Husted*, 39 Ohio I. ABS. 589, 54 N. E. (2d) 165 and *Bisoni vs. Carlson, et al.*, 171 Kansas 631, 237 P. (2d) 404. In neither case does the Court involved sup-

port its departure from the general rule by acceptable authority and the *Williams* case was decided by an intermediate appeal court in Ohio prior to the decision of the highest appellate court of that state in *Cunningham vs. Bell,* supra, which, in unequivocal language, adopted the general rule.

This question has not been before the Supreme Court of the State of South Dakota. However, the South Dakota Guest Statute was taken from Michigan law and is construed in accordance with the decisions of the Supreme Court of Michigan announced as of the date of its adoption. *Melby vs. Anderson,* 64 S. D. 249, 266 N. W. 135. Prior to this adoption, the Michigan Court had decided that the protection afforded by the guest statute should be extended to a non-driving owner. *Naudzius vs. Lahr,* 253 Mich. 216, 234 N. W. 581. Therefore, even if there had been a recognizable conflict in decisions among the various courts on the question involved, the Eighth Circuit Court of Appeals was required to follow the rule announced by the Michigan Court. *Huffman vs. Buckingham Transportation Company of Colorado, Inc.,* 10th Cir., 98 F. (2d) 916 unless such construction indicated a clear misapprehension of the law.

Petitioner objects to the holding of the trial and appeal courts that in the absence of a finding of wilful and wanton misconduct on the part of the driver of the vehicle, there could be no owner liability because his acts, no matter how classified, could not be considered the proximate cause of the damage suffered. In adopting this construction the Courts followed the interpretation of the statute by the Michigan Court in *Naudzius vs. Lahr,* supra. Again, this question had not been before the South Dakota Court and the Michigan construction was controlling. *Melby vs. Anderson,* supra.

However the Court of Appeals found as a matter of law that there were no acts of the driver or owner constituting wilful and wanton misconduct as those terms have been defined by the Supreme Court of the State of South Dakota (R. 51-57). These findings were decisive of the case and standing alone required that the decision of the trial court be affirmed. Significantly, in the argument now presented by Petitioner,

there is no attempt by reason or authority to prove error in these holdings. Conceding that the Courts below were in error in applying the "proximate cause" rule (and we submit they were not), it is established that if the decisions below are correct although not premised on proper grounds, they will be upheld. *Helvering vs. Gowran,* 302 U. S. 238, 58 S. Ct. 154, 82 L. Ed. 224 and cases cited therein.

ALLEGED UNCONSTITUTIONALITY OF GUEST STATUTE AS CONSTRUED

The argument that the South Dakota Guest Statute as construed by the trial and appeal courts contravenes the "due process" clauses of the State and Federal Constitutions was initially raised by Petitioner in his application for rehearing before the Court of Appeals (R. 61, 62). That issue was not raised in the pleadings (R. 2-5). Indeed, Petitioner's complaint proceeded on the theory that the owner of a vehicle was protected by the guest statute and he may not now be heard to argue that the statute as so construed is unconstitutional. *United States vs. Nudleman, et al.* (CCA 7), 104 F. (2d) 549, certiorari denied 308 U. S. 589, 60 S. Ct. 115. *Clarke vs. Storchak,* 348 Ill. 564, 52 N. E. (2d) 229, appeal dismissed 64 S. Ct. 1269, 322 U. S. 713, 88 L. Ed. 1555.

However the constitutionality of guest statutes has heretofore been upheld by this court in *Silver vs. Silver,* 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221 and by the various state courts in *Silver vs. Silver,* 108 Conn. 371, 143 A. 240; *Hazzard vs. Alexander,* 36 Del. 212, 173 A. 517; *Naudzius vs. Lahr,* 253 Mich. 216, 234 N. W. 581 (on facts involving a nondriving owner); *Perozzi vs. Ganiere,* 149 Ore. 330, 40 P. (2d) 1009; *Sorrell vs. White,* 103 Vermont 277, 153 A. 359; *Shea vs. Olson,* 185 Wash. 143, 53 P. (2d) 615. It is the holding of all of these decisions that legislation in the field involved is within the police powers of the states. And while it may be argued that with the exception of the Michigan decision in *Naudzius vs. Lahr,* supra, the cases did not involve the extension of the protection of the statutes to nondriving owners, certainly the question of constitutionality revolves around the power in the state governments to set up a different

standard of care in guest situations. If that power exists to the protection of the driver of a vehicle, there can be no reason why it should not also exist to the protection of the absent or nondriving owner.

There was no error in the decisions of the courts below. The application for review by this Court should be denied.

Respectfully submitted,

M. T. WOODS and
F. M. SMITH,

Sioux Falls, South Dakota,

Attorneys for Respondents.